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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH V. ORLEANS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 509 F. 2d 197. The opinion and orders of the district court (App. B, *infra*) are not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on January 13, 1975. A timely petition for rehearing was denied on April 2, 1975. On June 23, 1975, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and in-

cluding July 31, 1975. A further extension to and including August 30, 1975, was granted by Mr. Justice Marshall on July 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employee of a community action agency that receives funding under the Economic Opportunity Act of 1964 is an "employee of the Government" within the meaning of the Federal Tort Claims Act.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

* * * * *

STATEMENT

1. Pursuant to Title II of the Economic Opportunity Act of 1964, 78 Stat. 516, as amended, 42 U.S.C. 2781 *et seq.*, the federal government, acting through the Community Services Administration (formerly the Office of Economic Opportunity), furnishes financial assistance for "community action programs," undertaken by "community action agencies." The Act defines a community action agency as a "State or political subdivision of a State * * * or * * * public or private nonprofit agency or organization which has been designated by a State or * * * political subdivision * * * which * * * is determined to be capable of planning, conducting, administering and evaluating a community action program * * *" (42 U.S.C. 2790(a)). In turn, "community action program" is defined as a program that provides "a range of services and activities having a measurable and poten-

tially major impact on causes of poverty in the community * * *'' (*ibid.*).

The Act places a variety of restrictions on the kind of organization that may receive funding as a community action agency. For example, guidelines are set down to ensure that the organization's governing board will be representative of the interests of the community to be served (42 U.S.C. 2791(b) and (c)); the organization is required to assume several broadly defined responsibilities in connection with the operation of its community action program (42 U.S.C. 2795(b)); it is required to observe administrative standards "which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this [Act]" (42 U.S.C. 2796(a)).

But the Act also puts substantial emphasis on local control over community action programs and on "maximum feasible participation of residents of the areas and members of the groups served" (42 U.S.C. 2781(a)(4)). The federal government is barred from establishing "binding national priorities" for the use of funds made available under the Act (42 U.S.C. 2808(e)). Instead, the governing board of each community action agency (which may not include any employee of the Community Services Administration; 45 C.F.R. 1015.735–19) retains authority "to appoint persons to senior staff positions, to determine major personnel, fiscal, and program policies, [and] to approve overall program plans and priorities" (42 U.S.C. 2791(e)).

2. The Warren-Trumbull Council for Economic Opportunity, Inc., is an Ohio community action agency authorized to receive federal funds under the Act (App. A, *infra,* pp. 1a, 6a).[1] Its community action program included the operation of the Westlawn Neighborhood Opportunity Center (App. A, *infra,* p. 1a). Respondent, a minor, was injured in an automobile accident while returning from an outing sponsored by Westlawn (App. A, *infra,* p. 1a). The driver of the automobile in which respondent was riding was another minor who also had attended the outing (see App. A, *infra,* pp. 1a–2a). Employees of the Council had arranged for respondent to ride in that car (*ibid.*).

3. Respondent, through his father, then brought this suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.,* alleging that "the agents of the United States of America in charge of [the Westlawn] outing were negligent in the organization and supervision of said outing * * *" (App. A, *infra,* p. 2a) and requesting $1,000,000 in damages (C.A. App. 4).[2] The United States moved for summary judgment on the ground that the Council is not an agency or instrumentality of the United States and therefore its employees are not "employees

[1] The Council is a nonprofit Ohio corporation that has been designated as a community action agency by the City of Warren, and the County of Trumbull, Ohio (App. B, *infra*, pp. 18a, 22a–24a).

[2] "C.A. App." refers to the appendix in the court of appeals. Respondent's father requested an additional $100,000 in damages (C.A. App. 4).

of the Government" within the purview of the Tort Claims Act. The district court granted the motion (App. B, *infra,* pp. 2a, 17a–21a).

The court of appeals reversed and remanded for trial. The court recognized that this Court in *Logue* v. *United States,* 412 U.S. 521, 531, had held (1) that the Tort Claims Act invokes the " 'traditional distinction between employees of the principal and employees of an independent contractor' " (App. A, *infra,* p. 9a) and (2) that, under that traditional distinction, "[o]nly if the principal has the right to supervise the 'physical performance' of the work of such employees do they become employees of the principal" (*ibid.*). The court of appeals further acknowledged (App. A, *infra,* p. 12a):

> The relationship between OEO and WTCEO meets a number of the criteria for establishing that WTCEO is an independent contractor. There was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn. Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the Warren-Trumbull County area. They are more in the nature of general instructions to be followed in order to assure that certain policies which Congress had adopted in establishing OEO are respected and adhered to.

The court nevertheless held that "resort to the traditional tests of the principal-contractor/employee

relationship" (App. A, *infra,* pp. 15a–16a) was inappropriate where the plaintiff was an intended beneficiary of a community action program. Reasoning that both the Tort Claims Act and the Economic Opportunity Act "were designed to remedy conditions which caused hardship and human suffering" (App. A, *infra,* p. 14a), the court concluded that Congress must have intended to make the government liable for any negligence of an employee of a community action agency that causes injury to an intended beneficiary who is "engaged in approved programs" (App. A, *infra,* p. 15a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals departs from the principles set forth by this Court in *Logue* v. *United States,* 412 U.S. 521, and directly conflicts with the decision of the Eighth Circuit in *Vincent* v. *United States,* 513 F. 2d 1296, petition for a writ of certiorari pending, No. 75–60.[3] The question whether the government has assumed liability for the negligence of the employees of community action agencies is an important and recurring one that should be promptly resolved.

1. The Federal Tort Claims Act confers jurisdiction on the district courts to entertain civil actions for money damages for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *" (28 U.S.C. 1346(b)). The Act defines "[e]mployee of the government" as including

[3] We are not opposing the petition in *Vincent.*

officers and employees of "any federal agency" (28 U.S.C. 2671) but further defines "federal agency" as expressly not including "any contractor with the United States" (*ibid.*).

This Court in *Logue* v. *United States, supra,* in holding that the United States is not liable for the negligence of employees of jails with which the federal government contracts for the safekeeping of federal prisoners, recognized that "the 'contractor with the United States' language of § 2671 adopts the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and * * * that the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor" (412 U.S. at 527–528).

A community action agency is an independent contractor under the test applied in *Logue.* As the court of appeals explicitly stated, "[t]here was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn" (App. A, *infra,* p. 12a).[4] Since the federal

[4] The court of appeals nevertheless concluded that community action agencies do not fit within the traditional meaning of the term "contractors" because (1) many such agencies are entirely dependent upon the federal government for funds, (2) their federally funded programs must be approved by the federal government, which also often devises the program in the absence of local initiative, and (3) the federal government retains the power to dictate major personnel and operating decisions by threatening to cut off funds. See App. A, *infra,* pp. 12a–14a. But these factors do not distinguish community action agencies from many other government contractors that are similarly dependent upon federal contracts that must be performed in accordance with detailed specifications. The role of the Community Services Administration in overseeing the federally funded activities of community action agencies is confined to the traditional exercise by the government of the right to inspect or audit to determine whether, and to attempt to ensure that, federal funds are, and will be, spent in accordance with the congressional purpose.

government does not "control the detailed physical performance of" community action agencies, those agencies are not federal agencies, and their employees are not "employee[s] of the Government" within the meaning of the Tort Claims Act. The contrary decision of the court of appeals is inconsistent with this Court's decision in *Logue* and has no basis in the Tort Claims Act.[5]

2. The decision below also directly conflicts with the decision of the Eighth Circuit in *Vincent* v. *United States, supra.* In *Vincent,* a participant in an outing sponsored by a community action agency was injured while riding as a passenger in an automobile driven by the agency's employee. The injured participant brought suit against the United States under the Tort Claims Act, alleging that the community action agency was a federal agency and therefore that the driver was an "employee of the Government." The district court rejected these claims and dismissed the

[5] The lack of any statutory underpinning for the court of appeals' decision is further shown by the court's suggestion that the *Logue* test might be applicable where the plaintiff was "a member of the general public" (App. A, *infra,* p. 15a) but not where, as here, the plaintiff is a member of a class of intended beneficiaries under the Economic Opportunity Act. The court did not attempt to explain how any construction of the Tort Claims Act could make the question whether an individual is an "employee of the Government" turn on the identity of the plaintiff.

complaint. 383 F. Supp. 471 (E.D. Ark.).[6] The Eighth Circuit affirmed, and in doing so specifically declined to follow the decision of the Sixth Circuit in this case. 513 F. 2d at 1298.[7]

3. The conflict represented by *Vincent* and the decision below should be resolved in order to give appropriate guidance to the federal courts and forestall further litigation of the question of the scope of the government's liability with respect to the negligence of employees of community action agencies.[8] We are informed by the Community Services Administration that approximately 35 civil actions arising out of alleged negligence by employees of community action agencies, involving substantial claims, are presently pending against the United States. Each of those actions necessarily involves the question presented

[6] All other district courts that have considered the question in reported decisions have reached the same result. See, *e.g.*, *Hughes* v. *United States*, 383 F. Supp. 1071 (S.D. Iowa); *Prater* v. *United States*, 357 F. Supp. 1044 (N.D. Texas).

[7] The Fifth Circuit has similarly held that discharged employees of community action agencies are not discharged federal employees for purposes of the Due Process Clause. *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F. 2d 1052; *Robles* v. *El Paso Community Action Agency*, 456 F. 2d 189. See, also, *United States* v. *Del Toro*, 513 F. 2d 656 (C.A. 2).

[8] The judgment in *Vincent* is final. The judgment below is interlocutory in the sense that the case has been remanded for further proceedings, but it is a final determination of the legal issue presented here, which will control future litigation in the Sixth Circuit. Accordingly, the nonfinality of the judgment below does not bar certiorari review. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3; *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2.

here. There are, moreover, approximately 863 community action agencies throughout the United States, and failure to resolve the question presented here may lead to further litigation arising out of the continuing activities of those agencies.

Failure to review and reverse the decision below may also lead to litigation arising out of the allegedly negligent acts of employees of other types of federally funded or assisted organizations. Cf. *United States* v. *Del Toro*, *supra* (involving an employee of a federally funded "Model Cities program").

CONCLUSION

The petition for a writ of certiorari should be granted. If the petition for a writ of certiorari in *Vincent* is also granted, the Court may wish to consolidate the two cases for argument.

Respectfully submitted.

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APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 74–1496

JOSEPH V. ORLEANS, BY HIS FATHER AND NEXT FRIEND, JOSEPH A. ORLEANS, ET AL., PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed January 18, 1975.

Before: PECK and LIVELY, *Circuit Judges;* and McALLISTER, *Senior Circuit Judge.*

LIVELY, *Circuit Judge.* This action was filed under the Federal Tort Claims Act to recover for personal injuries suffered by the plaintiff in an automobile accident. Plaintiff was one of a group of children who had been taken to a recreational area some distance from their homes on an outing which was part of the program of the Westlawn Neighborhood Opportunity Center (Westlawn). Westlawn was an "activity" of the Warren-Trumbull Council for Economic Opportunity, Inc. (WTCEO). A van was furnished by WTCEO to Westlawn for the outing, but it was not large enough to carry all the children who turned out for the affair. Employees of WTCEO arranged for two young men from the Westlawn area to drive some of the children to the outing in privately owned automobiles. Plaintiff was a passenger in an automobile driven by Robert Walker and owned by

Robert's father on the return trip when the accident occurred.

The complaint alleged that the outing was sponsored by the Office of Economic Opportunity and "that the agents of the United States of America in charge of said outing were negligent in the organization and supervision of said outing . . ." resulting in plaintiff's injuries. The government answered that WTCEO is not an agent or instrumentality of the United States, nor is Westlawn such an instrumentality. In addition, the defendant denied that any agents of the United States were "present during, before, or after the described outing."

The defendant then moved for summary judgment and filed with its motion the affidavit of the regional director of the Office of Economic Opportunity (OEO) having jurisdiction of WTCEO, copies of community action program grants from OEO to WTCEO and a copy of an unpublished district court opinion. The gist of the regional director's affidavit is that the supervisors of WTCEO and Westlawn were not employees of OEO on the date of the accident and that these organizations "make their own decisions as to whom to hire, discipline and discharge." It states that OEO involvement in personnel decisions of WTCEO and Westlawn "is limited to the issuance of standards." The affidavit concludes with the statement that OEO does not supervise "either on a day-to-day basis or otherwise" the activities of employees of the two organizations and that the employees are not "subject to OEO supervision or control as to the quantity or quality of the work product they produce."

In opposition to summary judgment the plaintiff filed affidavits of the chairman of the governing board of WTCEO and an attorney who had participated in the organization and management of WTCEO. In his

affidavit the board chairman stated that he was appointed directly by the Regional Office of OEO and "that presently the entire funding of the Warren-Trumbull Council for Economic Opportunity is by funds of the United States except for some so-called 'in kind' contributions, and that to his knowledge this is and has been the case throughout the history" of WTCEO. The affidavit of the attorney-board member contained *inter alia,* these statements:

> That the corporation was formed for the purpose of obtaining funds made available through the Economic Opportunity Act of 1964 and to act primarily as an instrumentality of the United States by carrying out the purposes of the Economic Opportunity Act. The corporation was carefully organized and the by-laws and regulations tailored to come within the restrictions of the Economic Opportunity Act.
>
> After the organization of the Warren Council for Economic Opportunity, Inc., it was funded almost totally by Federal funds made available through the Economic Opportunity Act, the only exception being some credit that may have been given for "in kind" services rendered by local citizens. Its management and operation were under the direct supervision of the Regional Director of the Office of Economic Opportunity in Chicago.
>
> The projects undertaken were those suggested by the Economic Opportunity Act or the directives of the Economic Opportunity Administration.
>
> One of the projects undertaken by the Warren Council for Economic Opportunity, Inc. was the Westlawn Neighborhood Opportunity Center, which project was set up in accordance with the provisions of the Economic Opportunity Act of 1964 and more specifically, that portion at 42 U.S. Code Annotated, Section 2811,

* * * * *

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The Affiant says that from the time of the organization of the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center, the Warren Council for Economic Opportunity, Inc. and Westlawn Neighborhood Opportunity Center acted as agencies to serve and assist the poor in methods and manners outlined and prescribed by the Economic Opportunity Act and numerous instructions, restrictions and requirements of the Director of the Office of Economic Opportunity. These instructions and requirements directed the manner in which the Warren Council for Economic Opportunity, Inc. and the Westlawn Neighborhood Opportunity Center be organized, the classes of persons who were to be employed as directors or serve as trustees, the nature and purpose of the projects to be undertaken and the methods for carrying out such projects. Before funding was granted, the United States of America, through the Office of the Director of Economic Opportunity and his regional directors, was required to approve projects and the outlined approach for conducting them. After a project was approved, its operation was supervised by the Office of the Regional Directors in Chicago.

Without the Economic Opportunity Act and the funds made available thereunder, the Warren Council for Economic Opportunity, Inc. would not have been created and could not have operated or existed.

The plaintiff also filed depositions of a former employee of Westlawn, the former director of WTCEO and of the regional director of OEO whose affidavit had been filed by defendant. These depositions explored the relations between OEO and the local organizations, particularly with respect to personnel matters, funding and selection of projects.

In granting summary judgment for the defendant the district court found that no issue as to any material fact existed and accepted as true the following "four basic facts" urged by the plaintiff:

> First, the Warren-Trumbull Council for Economic Opportunity, Inc. was created for the purpose of carrying out the community action programs contained in the Economic Opportunity Act of 1964. Second, the Warren-Trumbull Council and its activity, the Westlawn Neighborhood Opportunity Center, received funds from no source other than the Office of Economic Opportunity. Third, the Council conducted no programs other than those formulated and funded by the federal government. Fourth, the Office of Economic Opportunity and its regional office in Chicago exercised close supervision over the Council and its activities.

The court rejected the plaintiffs conclusion that these facts require a holding that the United States may be sued under provisions of the Federal Tort Claims Act on account of the negligence of an employee of WTCEO or Westlawn. Rather, he found that the defendant was entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.

Under the Federal Tort Claims Act recovery is allowed against the federal government generally in those cases where recovery would be permitted against a private individual or corporate defendant. 28 U.S.C. § 2674. Exclusive jurisdiction of actions for damages under this Act is vested in the district courts. 28 U.S.C. § 1346(b). Since the government acts only through its agents and employees, general principles of *respondeat superior* apply, subject to 28 U.S.C. § 2671 which contains these definitions:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the

military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

The district court concluded that WTCEO is a contractor with OEO and "thus the government is specifically excluded from liability for torts of the employees of the council under 28 U.S.C. § 2671." The court found that the approach to eliminating poverty which Congress adopted in the Economic Opportunity Act of 1964, 42 U.S.C. § 2701 *et seq.*, was basically to rely on local community effort. The purpose of a community action council such as WTCEO is not merely to act as a federal agency to administer federal programs. Rather, the court held its responsibility is to use local capabilities to coordinate all programs in the community, including state and local programs, as well as federal ones. The fact that WTCEO received no funds other than grants from OEO and conducted no programs other than those initiated by OEO was held to be immaterial. Relying on the charter of WTCEO which permitted it to receive funds from other sources, and various provisions of the Economic Opportunity Act which define the purposes of community action councils and their relations with OEO,

the district court held that WTCEO and Westlawn were not corporations primarily acting as agencies or instrumentalities of the United States. If the two local organizations do not come within the statutory definition of "Federal agency," it follows that the acts and omissions of their employees which were charged in the complaint were not those of "Employee[s] of the government." 28 U.S.C. § 2671.

On appeal, plaintiff contends that WTCEO was not a contractor, but at all times functioned as a "Federal agency" within the definition of Section 2671. In deciding whether a given relationship is that of principal and agent or principal and independent contractor, the courts are concerned primarily with the type and extent of control retained by the principal. Generally, if the principal looks to the other party for results only, leaving to that party discretion as to means and control over the methods and details of performance, the relationship is that of principal and independent contractor. The greater the control, the greater is the likelihood of a finding of agency. In *Schetter* v. *Housing Authority of the City of Erie,* 132 F. Supp. 149 (W.D. Pa. 1955), the government defended a Federal Tort Claims Act case on the theory that a public housing authority which leased a housing project from the Federal Public Housing Administration was an independent contractor. The court noted numerous provisions of the lease which led it to "conclude that Erie is not an independent contractor since Erie was controlled by the United States with respect to the performance of the undertaking provided by the agreement between the United States and Erie." *Id.* at 152. See also *Toth* v. *United States,* 107 F. Supp. 37 (N.D. Ohio 1952). While a member of the Court of Appeals for the Eighth Circuit, Mr. Justice Blackmun wrote the opinion in *Buchanan* v. *United*

States, 305 F. 2d 738 (1962), which listed some of the factors to be considered in deciding whether a person is an independent contractor as follows: "(1) Control of the work; (2) control of the premises; (3) control over the means of performance; (4) nature of the work done; (5) supervision of work; (6) control of personnel; (7) furnishing of personnel and material; (8) method of payment; (9) freedom of the contractor in employment policy; and (10) procurement of insurance covering personnel, social security payments, and like items." *Id.* at 742.

There are a number of cases in which independent contractor status was assumed, but the contention was made that particular circumstances had caused the principal to lose his insulation from liability for negligence of employees of the contractor. In *Lipka* v. *United States,* 369 F. 2d 288 (2d Cir. 1966), it was held that the independent contractor status of one engaged by the Corps of Engineers was not destroyed by reservation of the power to control the contractor's compliance with specifications or the institution of an accident prevention program. A similar result was reached in *United States* v. *Page,* 350 F. 2d 28 (10th Cir. 1965), where it was held that reservation of the right to make safety inspections and to require greater safety precautions than those normally practiced by the contractor in question did not make the principal liable for negligent acts of the contractor. See also *Gowdy* v. *United States,* 412 F. 2d 525 (6th Cir. 1969). On the other hand, the government has been held liable for negligent acts of employees of a contractor whose performance was subject to detailed supervision by a public housing authority. *Maryland* v. *Manor Real Estate & Trust Company,* 176 F. 2d 414 (4th Cir. 1949). In *Logue* v. *United States,* 412 U.S. 521 (1973), the Supreme Court stated that the pur-

pose of the exclusion of "contractors with the United States" found in Section 2671 is to afford the government the same immunity from tort liability arising out of negligent acts of an employee of a contractor as is enjoyed by private individuals who deal with such contractors. As the Court said, it is based on the "traditional distinction between employees of the principal and employees of an independent contractor." *Id.* at 527. If the principal lacks authority to control the detailed performance of the contractor, it cannot be treated in law as the employer of that contractor's employees. Only if the principal has the right to supervise the "physical performance" of the work of such employees do they become employees of the principal. *Id.* at 531.

The question in this case is whether a community action council formed for the purposes of the Economic Opportunity Act, which receives funds solely from the federal government and operates within the statutory and regulatory "guidelines" of OEO which are applicable to such councils, is to be deemed a federal agency or an independent contractor with the government when sued by a "client" of the agency claiming injury as the result of negligence on the part of agency employees. In seeking analogies in decisions involving other federally funded programs it is necessary to keep in mind the concept of the importance of using all the resources of the local community to fight poverty which underlies the Economic Opportunity Act of 1964. From the President's message on poverty of March 16, 1964 (S. Doc. No. 86, 88th Cong., 2d Sess. 2–4 (1964)) (hereafter Sen. Doc.) through the Congressional presentation of Sargent Shriver of March 17, 1964 (Sen. Doc. 35–74) and the legislative history of the Act itself there is a clear and repeated emphasis on the importance of local community par-

ticipation. Furthermore, an examination of the affidavits and depositions filed by the plaintiff leaves no room for doubt that the purpose of WTCEO is to implement in the community which it serves the policy and goal of eliminating poverty in the Nation as expressed by Congress in the Economic Opportunity Act of 1964. In pursuing this policy Congress established the Office of Economic Opportunity in the Executive Office of the President. Central to the scheme of the Act are the provisions for community action programs. 42 U.S.C. §§ 2781–2837. The determination to be made is whether, in choosing to fight this sector of the "war on poverty" by utilizing community action agencies rather than acting directly through OEO at the local level, Congress intended for these community organizations to be "Federal agencies" within the definition contained in the Tort Claims Act.

Several sections of the Economic Opportunity Act must be examined. With respect to community action governing boards, 42 U.S.C. § 2791(e) provides:

> (e) The powers of every community action agency governing board shall include the power to appoint persons to senior staff positions, to determine major personnel, fiscal, and program policies, to approve overall program plans and priorities, and to assure compliance with conditions of and approve proposals for financial assistance under this subchapter.

Section 2795 deals with the powers of the agencies themselves, in part as follows:

> (a) In order to carry out its overall responsibility for planning, coordinating, evaluating, and administering a community action program, a community action agency must have authority under its charter or applicable law to receive and administer funds under this subchapter, funds and contributions from private or local

> public sources which may be used in support of a community action program, and funds under any Federal or State assistance program pursuant to which a public or private nonprofit agency (as the case may be) organized in accordance with this part could act as grantee, contractor, or sponsor of projects appropriate for inclusion in a community action program. A community action agency must also be empowered to transfer funds so received, and to delegate powers to other agencies, subject to the powers of its governing board and its overall program responsibilities. This power to transfer funds and delegate powers must include the power to make transfers and delegations covering component projects in all cases where this will contribute to efficiency and effectiveness or otherwise further program objectives.

The Act also sets administrative standards for operation of community action agencies and requires them to adopt "rules designed to establish specific standards" relating to employee pay and benefits and promotion procedures, the avoidance of conflicts of interest and appropriate advocacy on behalf of the poor without participation in picketing, protest or violation of law. 42 U.S.C. § 2796(a). The provisions for financial assistance from OEO to community action agencies are found in Section 2808, which provides in sub-section (e) that—

> (e) In order to promote local responsibility and initiative, the Director shall not establish binding national priorities on funds authorized by this section, but he shall review each application for financial assistance on its merits. Before extending financial assistance to a new community action agency under this section, and in determining the amount of and conditions on which such assistance shall be extended, the Director shall consider the extent and nature of poverty in the community and the prob-

> able capacity of the agency to carry out an effective program. In reviewing or supplementing financial assistance to a previously existing community action agency, he shall consider the progress made in carrying on programs by such agency.

The relationship between OEO and WTCEO meets a number of the criteria for establishing that WTCEO is an independent contractor. There was no showing that OEO controlled or supervised the physical performance of the work of employees of WTCEO and Westlawn. Moreover, the requirements imposed on these local agencies by statute and regulations are not concerned with the details of the day-to-day operations of the agencies or the programs which they carry on in the Warren-Trumbull County area. They are more in the nature of general instructions to be followed in order to assure that certain policies which Congress had adopted in establishing OEO are respected and adhered to. On the other hand, by withholding approval of its operations, OEO had for all intents and purposes put WTCEO out of business for a period of time and had in October 1972 selected a new chairman of its board who completely reorganized the agency. These are not powers usually possessed by a principal in dealing with an independent contractor.

The plaintiff argues that the court should not decide the issue on potentialities, but on actuality. He maintains it is irrelevant that WTCEO might have obtained funds from other sources and might have carried on programs other than those planned by OEO. The fact is, he contends, that WTCEO never had any funds except those from the federal treasury which were granted to it by OEO and never initiated a single program other than the "canned" ones offered to it by OEO. The facts of the actual history of the operation of WTCEO, including the incident which demonstrated that OEO possessed the power to dictate to its governing board, lead to the conclusion, he maintains, that WTCEO was a corporation primarily acting as an instrumentality or agency of the United States, and therefore a "Federal agency" as defined in 28 U.S.C. § 2671.

In two cases involving the rights of employees of community action agencies similar to WTCEO, the Fifth Circuit has held that such employees were employees of a private corporation and not of the government. *Robles* v. *El Paso Community Action Agency, Project Bravo, Inc.*, 456 F. 2d 189 (1972); *Hines* v. *Cenla Community Action Committee, Inc.*, 474 F. 2d 1052 (1973). Though neither of these cases arose under the Federal Torts Claims Act and the agency-contractor dichotomy was not present, decision in both was based on a finding that the plaintiffs were not public employees. In his dissent in the *Cenla* case, Judge Wisdom pointed to some of the controls which OEO retained in its dealings with the local agency in the following language:

> As appears from the complaint, Cenla was organized for the purpose of qualifying as a grantee community action agency of the OEO under 42 U.S.C. § 2781. Congress adopted the Equal Opportunity Act to combat poverty, to create jobs, to disburse money for the reduction or elimination of poverty, all on a national scale. To insure federal supervision and uniformity, OEO divided the country into regions and adopted guidelines. Cenla, for example, is directly responsible to Region VI of OEO in Dallas, Texas. It must comply with the guidelines and policies formulated by Region VI in Dallas. In the event of any conflict between the policies and practices of Cenla with those of Region VI or federal legislation (as interpreted by OEO), Cenla must yield. *Id.* at 1059.

We do not believe that the community action agencies created in response to passage of the Economic Opportunity Act of 1964 fit the traditional definition of independent contractors insofar as their relations with agency clients are concerned. They have ties to the OEO which do not normally exist between a principal and an independent contractor. While many of the traditional criteria of independence are present, the power in the principal to remove the governing board of the other contracting party and replace it with one of its own choosing is totally inconsistent with the status of independent contractor. Furthermore, even a cursory reading of the voluminous regulations of OEO leaves one with the distinct impression that an organization required to operate in compliance with these "guidelines" must indeed be a federal instrumentality. The controls which are retained apply particularly to relations between the local agencies and their clients who are the beneficiaries of the 1964 Act.

Congress could have chosen to administer the Economic Opportunity Act directly by establishing local offices of OEO. The declared reason for using local agencies is to assure the maximum participation of the citizens most affected by the program in each community, to the end that the particular needs of each participating community will be discovered and dealt with. Thus, a national priority in programs is forbidden. Nevertheless, OEO approval is required for each local program and all the operations of community action agencies must fit within the detailed framework ordained by OEO.

Both the Federal Tort Claims Act and the Economic Opportunity Act of 1964 were designed to remedy conditions which caused hardship and human suffering. Before the passage of the Tort Claims Act,

a person injured as the result of negligence of an employee of the government was denied a remedy which was available to another whose injuries were caused under similar circumstances by the negligence of a private individual or the employee of a private firm. Elimination of this disparity which was based on the outmoded legal fiction that "the king can do no wrong" achieved a laudable humanitarian result. Congress embarked on another humanitarian effort of monumental proportions when it undertook, with the passage of the 1964 Act, a program for the eventual elimination of poverty in this Nation.

When the two Acts here involved are read together and consideration is given to the purpose of each, it does not appear that Congress intended to shield the government from liability in a situation such as this case presents. The scheme of the 1964 Act is to improve the lot of the poor by involving them in a multitude of activities which their poverty had previously prevented them from experiencing. To the extent that participation in these activities exposes the beneficiaries of the Act to injury while engaged in approved programs under the supervision of personnel of a community action agency, the United States cannot avoid liability under the Federal Tort Claims Act on the ground that agencies chosen to achieve the purposes of the 1964 Act are not federal agencies or instrumentalities. To equate the status of such an agency with that of independent contractor under these circumstances would be to elevate form above substance.

It should be noted that this case does not present the issue of whether a member of the general public may base a Tort Claims Act proceeding on alleged negligence of an employee of a community action agency. Decision in such a case might well be reached

by resort to the traditional tests of the principal-contractor/employee relationship unaffected by the special considerations which flow from the peculiar federal responsibility for the safety and well-being of persons drawn into the programs of OEO. Nor do we intimate any opinion on the merits of the present case.

The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

United States District Court
Northern District of Ohio
Eastern Division

Civil Action No. C 72–260–Y

JOHN V. ORLEANS, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Order Granting Summary Judgment in Favor of Defendant

(Filed September 13, 1973)

This matter comes before the court on a motion for summary judgment filed on behalf of the United States.

The action is brought against the United States of America, pursuant to the "Tort Claims Act" by Joseph A. Orleans as father and next friend of Joseph V. Orleans, for injuries suffered by the son when the car in which he was returning home from an outing sponsored by the Westlawn Neighborhood Opportunity Center, an activity of the Warren-Trumbull Council for Economic Opportunity, Inc., left the road and collided with a parked truck.

The United States bases their motion for summary judgment on the ground that the Warren-Trumbull Council for Economic Opportunity is a contractor with the Office of Economic Opportunity and thus the government is specifically excluded from liability for torts of the employees of the council under 28 U.S.C. § 2671.

The court finds that this position is valid and the motion for summary judgment should be granted.

The Warren-Trumbull Council for Economic Opportunity, Inc. is a corporation not for profit incorporated under the authority of Section 1702.01 et seq. of the Ohio Revised Code.

The articles of incorporation filed by the Warren Council for Economic Opportunity, Inc. contain five avowed purposes. Only one of these makes any reference to federal acts or programs.

> (2) To coordinate efforts of local government units especially the City of Warren, the Warren Board of Education, Trumbull County and others, and private agencies, in programs devised under, or which shall be devised under the Economic Opportunity Act of 1964; (Exhibit A, Affidavit of William McClain.)

While it may be true that virtually all of the funds for the operation of the Warren-Trumbull Council were furnished by the O.E.O., the third purpose in the Articles of Incorporation includes the phrase ". . . to receive, administer, and disburse funds from whatever source received . . ."

The governing boards of community action agencies must have ". . . power to appoint persons to senior staff positions, to determine major personnel, fiscal and program policies, to approve overall program plans and priorities and to assure compliance with conditions of and approve proposals for financial assistance under this subchapter." 42 U.S.C. § 2791(e).

Among the functions of the boards is to establish priorities among projects, activities and areas as needed for the best and most efficient use of resources.

The Director of O.E.O. is prohibited from establishing binding national priorities by 42 U.S.C. § 2808 (e).

The Board thus has control over personnel and programs and although the Warren-Trumbull Council was virtually 100% funded by O.E.O., they were empowered to receive and distribute funds from other sources.

In the case of *George Freeman, Jr., et al. v. Wendall Verdun, et al.*, C 72–1292 Y, this court found that the Warren-Trumbull Council for Economic Opportunity, Inc. is an independent corporation not for profit and as such is a private employer, thus the employees are not government employees.

In accord with this decision is *Robles v. El Paso Community Action Agency, Project Bravo, Inc., et al.*, 456 F.2d 189. In this case an employee sued a community action agency seeking reinstatement to a position from which she had been released. The court at pages 190 f. writes:

> As a community agency, the El Paso Community Action Agency Project Bravo, Inc., receives federal assistance by grant from the Office of Economic Opportunity to carry out a community action program pursuant to the provisions of the Economic Opportunity Act of 1964, Title 42, U.S.C. § 2790 et seq. . . . Once federal funds are granted for the purposes of such program, the El Paso Community Action Agency Project Bravo, Inc. is required to carry out its program in accordance with the terms of the federal funds grant and the general and specific conditions that may be laid down as the terms on which federal funds will be made available. These terms and conditions include requirements that funds be spent only for purposes specified in the approved application, requirements for accountability by means of internal fiscal controls, regular financial reports, and independent audits, and assurances against discriminatory employment practices or discriminatory treatment of beneficiaries on

> grounds of race or color. Such terms and conditions do not give the Office of Economic Opportunity the right to direct the manner of carrying out the approved program, nor do they give the Office of Economic Opportunity the right to select or discharge Project Bravo employees.

Judge Morris E. Lasker of the United States District Court for the Southern District of New York in the case of *Johnson* v. *Jumelle,* 359 F.Supp. 361 (1973) at page 362 quotes the above passage as support for the premise that an employee of a community action agency in New York City was not a federal employee.

Plaintiff cites *Toth* v. *United States,* 107 F.Supp. 34 (N.D. Ohio, E.D. 1952) and *Schetter* v. *Housing Authority of the City of Erie,* 132 F.Supp. 149 (W.D.Pa. 1955) as support for the position that the Warren-Trumbull Council for Economic Opportunity, Inc. is a corporation primarily acting as an instrumentality or agency of the United States.

Both of these cases concern injuries to persons in public housing. Both cases had written agreements between the local authority and the Public Housing Administration which provided that the United States was to receive all profits from the operation of the housing, the United States was to retain ownership of the land and was to receive back the improvements after the lease expired.

The United States further maintained control of fiscal affairs and management of the local authority involved. The government also controlled the selection of tenants, rent rates, employment terms and wages and the persons to be hired.

The court finds that the degree of control exercised by the Office of Economic Opportunity, Inc. was not as stringent as that exercised by the Public Housing

Administration over the respective local housing authorities. This court further finds no parallel between the contracts in the housing cases and the facts in the immediate case.

The plaintiff also cites *Delgado* v. *Akins,* 236 F. Supp. 202 (D.Ariz. 1964). In this case, the United States was held liable for the tort of a county agricultural agent. The bases for the court's decision were that the agent could be fired by the Department of Agriculture, that he was paid by a local committee from Department of Agriculture funds which were deposited by the Department in a local bank account, and that the county agency was also required to be listed in the local telephone directory under the heading United States Department of Agriculture. None of the above indicia of control are present in the instant case.

The court finds no relevance at all in the citations to the non-appropriated fund agency line of cases such as *United States* v. *Holcombe,* 277 F. 2d 143 (1960).

The court finds that the Warren-Trumbull Council for Economic Opportunity, Inc. is an independent private non-profit Ohio corporation and is a contractor with the United States and not a corporation acting as an instrumentality or agency of the United States. The court further finds that the employees of the Warren-Trumbull Council for Economic Opportunity, Inc. and its activity the Westlawn Neighborhood Opportunity Center are not federal employees under the meaning of 28 U.S.C. § 2671.

The court, therefore, finds that summary judgment must be granted in favor of the defendant United States of America.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.,
U.S. District Judge.

MEMORANDUM OPINION AND ORDER

(Filed January 9, 1974)

This matter comes before the court on a motion filed on behalf of the plainiffs asking the court to reconsider its ruling that the Warren-Trumbull Council for Economic Opportunity, Inc. and its subordinate activity, The Westlawn Neighborhood Opportunity Center are not Federal agencies within the definition of the Federal Tort Claims Act, 28 U.S.C. § 2671, and hence the United States is entitled to summary judgment.

The court has reviewed the briefs, and heard oral arguments on the present motion and has further reviewed the briefs and evidence filed in connection with defendant's original motion. The court finds that the original ruling was correct and must be reaffirmed.

The term "Federal Agency" as used in the "Federal Tort Claims Act" is defined as including ". . . the executive departments, the military departments, independent establishments of the United States and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States." 28 U.S.C. § 2671.

The plaintiffs in this case urge the court to find that the Warren-Trumbull Council for Economic Opportunity, Inc. is a corporation acting primarily as an instrumentality or agency of the United States and as such is included as a "Federal Agency" under the "Federal Tort Claims Act". To establish this position, the plaintiffs emphasize four points. First, the Warren-Trumbull Council for Economic Opportunity, Inc. was created for the purpose of carrying out the community action programs contained in the Economic Opportunity Act of 1964. Second, the Warren-Trumbull Council and its activity, the Westlawn Neighborhood Opportunity Center, received funds from no

source other than the Office of Economic Opportunity. Third, the Council conducted no programs other than those formulated and funded by the federal government. Fourth, the Office of Economic Opportunity and its regional office in Chicago exercised close supervision over the Council and its activities.

The court accepts the four basic facts upon which plaintiffs base their conclusion, but for the following reasons rejects their conclusion.

Congress provided two methods by which a community could receive federal aid under the community action section of the Economic Opportunity Act of 1964. First, a state or qualified subdivision or combinations of subdivisions, such as the City of Warren and Trumbull County, could act as their own community action agency or the same entities could designate a public or private organization, meeting the requirements of the act, as a community action agency for the area in their stead. 42 U.S.C.A. § 2790(a).

The City of Warren chose the latter course and established the predecessor organization of the Warren Trumbull Council for Economic Opportunity, Inc. as its designated community action agency. The original board was appointed by the City of Warren to meet the requirements of 42 U.S.C. § 2791(b). The City Solicitor of Warren drew up the Articles of Incorporation to correspond to the guidelines of 42 U.S.C. § 2795. The City of Warren designated the Warren Council for Economic Opportunity as its community action agency.

At a later time Trumbull County joined the City of Warren and the name was changed to the present one.

The statute setting up the composition of the governing boards of community action agencies requires

that they must consist of one-third of the members elected public officials or their designated representatives, one-third of the members elected by democratic process from the people served, and one-third representatives of business, industry, labor, religion, welfare, education and "other major groups and interests in the community". 42 U.S.C. § 2791(a).

One of the specific purposes included by Congress in their statement of purpose is:

> (1) the strengthening of community capabilities for planning and coordinating Federal, State, and other assistance related to the elimination of poverty, so that this assistance, through the efforts of local officials, organizations, and interested and affected citizens, can be made more responsive to local needs and conditions.

It would appear that Congress intends the community action agency to be a local agency for coordinating all programs in the community, State, local and others as well as federal and is to be made up of local people including local elected public officials rather than a federal agency utilizing only federal programs and run by Federal Officers.

If we accept the plaintiff's contention, the Mayor of Warren could be a Federal Official for purposes of the Federal Tort Claims Act, if he were to commit a tort while serving on the board as is required by 42 U.S.C. § 2791(b).

Congress has limited federal financial assistance to community action programs to 80% unless the Director of O.E.O. determines that it is necessary to increase the percentage for a certain program. The community is permitted to use in kind services fairly evaluated to help meet this twenty percent. 42 U.S.C. § 2812(c).

The plaintiffs in this case stress that the only contributions made by the Warren-Trumbull Council and the Westlawn Neighborhood Center were of the in kind variety and that these may not have been fairly evaluated. They make no claim of a decision by the Director of O.E.O. that the federal participation should exceed 20%.

As is required by 42 U.S.C. § 2795(a), the Articles of Incorporation of the Warren Trumbull Council for Economic Opportunity, Inc. contains a clause enabling the council ". . . to receive, administer and disburse funds from whatever source received . . ." The fact that the Council did not receive funds from sources other than the Federal Government whether through passive inaction or through affirmative action should not create a liability on the part of the United States when Congress did not intend the United States to be the sole source of such funds.

The Congressional statement of purpose which introduces the subchapter on community action agencies and programs states that the basic purpose of the subchapter ". . . is to stimulate a better focusing of all available local, State, private and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages in rural and urban areas, to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self sufficient." 42 U.S.C. § 2781(a). Congress also stressed in the purpose clause the necessity for local control and innovation in the new programs subject to adequate evaluation.

The components of a community action program could include ". . . projects eligible for assistance under this subchapter, or projects assisted from other public or private sources; and they may be either specially designed to meet local needs or designed pur-

suant to the eligibility standards of a State or Federal program providing assistance to a particular kind of activity which will help in meeting those needs." 42 U.S.C. § 2790(b). Binding national priorities in authorizing funds for programing are prohibited by 42 U.S.C. § 2808(c).

These declarations indicate that Congress does not intend that the community action agencies such as the Warren-Trumbull Council limit themselves to canned Federal programs; but, instead they are to utilize all sources of programs including their own ingenuity. Here again plaintiff would like the court to interpret the failure of the Council to utilize sources outside of the federal sphere as a basis for finding that the Council is acting as an instrumentality or agency of the United States.

The court recognizes that the Office of Economic Opportunity exercises very close supervision over the general organization of community action agencies and over their financial dealings and Federally funded programs.

The court even recognizes the fact that Federal funding was stopped to the Warren-Trumbull Council until the Council was reorganized and that the Regional Director of the Office of Economic Opportunity appointed Sidney I. Roberts as chairman of the governing board to implement the reorganization.

Despite this control from the Office of Economic Opportunity, the Warren-Trumbull Council still remains an independent, locally controlled and constituted non-profit corporation. While the Office of Economic Opportunity has the power to cut off Federal funds if the council fails to meet federal standards, they have no power to cut off funds from other sources which the council is encouraged to utilize, and, while the O.E.O. maintains close supervision over the Federally packaged programs, the locally financed and constituted programs that community action agencies are encouraged to run are not subject to such control.

Thus, this court finds that the Warren-Trumbull Council for Economic Opportunity is a locally constituted and controlled independent corporation, not for profit, organized under the State of Ohio by the City of Warren and Trumbull County to combat poverty in the Warren-Trumbull County area by accepting federal funds and programs. While it does not seek or accept funds from other sources, it is empowered to do so by its charter and encouraged to by Congress. Also, while it does not institute its own projects, it is empowered to do so by its charter and is encouraged to do so by Congress. Thus, instead of becoming an independent organization carrying on programs initiated and funded by a variety of sources as envisioned by Congress, the Warren-Trumbull Council for Economic Opportunity, Inc. has become, in effect, an organization to contract with the Office of Economic Opportunity for Federal funds to run prepackaged Federal programs for the Warren-Trumbull County Area.

For these reasons and those included in the original order filed September 13, 1973, the court finds that its prior ruling granting defendant's motion for summary judgment must be affirmed.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.,
U.S. District Judge.

APPENDIX C

United States Court of Appeals for the Sixth Circuit

No. 74–1496

JOSEPH V. ORLEANS, BY HIS FATHER AND NEXT FRIEND, JOSEPH A. ORLEANS, ET AL., PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Before: PECK and LIVELY, *Circuit Judges;* and MCALLISTER, *Senior Circuit Judge.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard for the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendant-Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by Order of the Court.

JOHN P. HEHMAN,
Clerk.

A True Copy, Attest:

JOHN P. HEHMAN,
Clerk.